

TERMS AND CONDITIONS OF SALE

- 1.0 APPLICABILITY - SUBJECT TO THE EXPRESS PROVISIONS ON THE FACE OF THIS DOCUMENT, AND THE EXPRESS TERMS OF ANY WRITTEN AGREEMENT BETWEEN THE PARTIES AND APPLICABLE TO THIS TRANSACTION, THESE TERMS AND CONDITIONS EXCLUSIVELY GOVERN ALL QUOTATIONS, ORDERS, SALES, SERVICES, SOFTWARE LICENSES AND OTHER LICENSES ENTERED INTO BY SELLER AND BUYER. ACCEPTANCE OF BUYER'S ORDER AND SELLER'S AGREEMENT TO FURNISH PRODUCTS, SERVICES, SOFTWARE LICENSES OR OTHER LICENSED CONTENT ARE EXPRESSLY CONDITIONED ON BUYER'S ASSENT TO THESE PROVISIONS.** This terms and conditions of sale document (this "**Agreement**") is intended to be the parties' final and exclusive statement of the terms of their agreement with respect to equipment, systems; spare parts or other products; software licenses or other content; or services; provided to Buyer by Seller. No course of dealing, no usage of trade, and no acceptance or acquiescence to any course of performance shall modify or alter this Agreement. Any additional or different term(s) or condition(s), including, but not limited to, terms and conditions stated on Buyer's RFQ, purchase or other order form or notice, shall be deemed a material alteration of, and be inapplicable to, any transaction hereunder unless specifically agreed to in writing by Seller. Buyer hereby expressly and irrevocably waives any claim or right to assert any claim based on an oral modification of the terms hereof or oral promises or representations relating to Seller's sale or provision of equipment, systems, parts, other products, software licenses, other licensed content, or services hereunder.
- 2.0 PAYMENT - Payment is due in Euro worldwide as follows: (1) with respect to products (inclusive of upgrades): (a) 50% of the purchase price at order confirmation, 40% upon shipment, and 10% upon Acceptance (as defined below) but no later than sixty (60) days after date of shipment, (2) with respect to refurbished and NUSED products (NUSED products are components that were installed for testing purposes but not exposed to processing), (a) 30% of the purchase price in the form of a non-refundable prepayment is due upon receipt of order; (b) 60% prior to shipment; and (c) 10% remainder upon Acceptance, but no later than sixty (60) days after date of shipment, and (3) with respect to all other parts, products, licenses and services, 100% of the purchase price no later than thirty (30) days after date of shipment (for products or licenses) or performance (for services). "Acceptance" is deemed complete upon the earlier of (1) completion of start-up and installation of the product in conformance to the agreed specifications, or (2) utilization in commercial production or other intended use of any license, product, or process, (3) completion of the service as described in any statement of work, or (4) sixty (60) days after shipment, if Buyer fails to install or reject the products, licenses or services before such date. Seller reserves the right in its reasonable judgment to place Buyer on credit hold in response to Buyer's financial condition. Late payments are subject to interest at the highest rate allowed by applicable law.**
- 3.0 TAXES - Any tax, duty, fee or charge imposed currently or subsequently by any governmental or other taxing authority shall, upon demand by Seller, be paid by Buyer in addition to Seller's quoted or invoiced prices, except where Buyer timely provides Seller with a valid tax exemption certificate.**
- 4.0 SECURITY INTEREST - Buyer grants Seller a continuing first security interest and lien, or the equivalent in a non-U.S. jurisdiction ("Lien"), upon any products, licenses or services that**



Seller provides to Buyer hereunder, and in the proceeds and products thereof (collectively the "Collateral"), until Buyer makes full payments required hereunder. Buyer agrees, as reasonably necessary, to execute further documents and to take all actions Seller requests to protect and perfect this Lien. Buyer irrevocably appoints Seller as Buyer's attorney-in-fact, which shall be an appointment coupled with an interest, to execute and file on behalf of Buyer a UCC-1 financing statement, or the equivalent in a non-U.S. jurisdiction, describing the Collateral. California law, without regard to conflict of laws provisions, governs the creation, perfection and enforcement of this Lien and rights thereunder. All Seller's rights and remedies shall be cumulative.

5.0 DELIVERY; PROVISION FOR SERVICES; FORCE MAJEURE - Shipment of products hereunder shall occur as of the first date available for shipment or such other shipment/delivery date as specified in the Seller's Quote. Terms regarding shipping, delivery, risk of loss and requirements for insurance shall be in accordance with the International Commercial (INCO) Terms set forth in the Seller's Quote or, if not so specified therein, costs of shipment shall be borne by Buyer and risk of loss is effective EXW Seller's factory. If shipment of products originates within the United States for delivery outside of the United States, title to such shipped products (except for any licensed products) shall pass to Buyer when the products leave the territorial limits of the United States. For shipments originating within the United States for delivery within the United States, and for shipments originating outside of the United States (regardless of destination) title to such shipped products (except for any licensed products) shall pass to Buyer at Seller's dock. Buyer agrees to grant Seller continuous and unrestricted access to product operating performance data (broadly defined as values of qualitative or quantitative variables or items of information whether measured or otherwise produced by human beings, computers, or other tools, regardless of the storage medium) and Buyer's confidential and proprietary information to the extent necessary for Seller's provision of services and/or products to Buyer. Seller shall be the sole and exclusive owner of the intellectual property included in, generated, created or derived as part of the services, provided, however, that to the extent that any such intellectual property was the property of Buyer or any third party before the Effective Date, Seller shall be a licensee or a sublicensee in perpetuity of such intellectual property. Seller shall own all data and information by, from, or about Seller's products, Seller, or Seller's customers that are received or obtained by Buyer in connection with Seller's performance under this Agreement. Title to expressly stated deliverables of any services shall pass to Buyer upon completion of those services. Seller retains title over all licensed products or software provided to Buyer, providing only a limited license to such licensed product or software as described in Section 7, herein. Seller reserves the right to make partial shipment or partial performance, which Seller may separately invoice. Delay in shipment shall not relieve Buyer of its obligation to pay for products where payment is otherwise due or to accept subsequent shipments. Seller shall not be liable for any costs, losses, damages, claims or liabilities (collectively "Damages") due to non-performance caused by events beyond its reasonable control. In such instance, Seller may, at its option and without limitation (1) extend the shipment or service date for a time equal to the period of the delay, (2) adjust prices or assess a surcharge to facilitate its performance, and/or (3) allocate its available supply/resources among its customers when it is unable to supply its total demands and/or commitments. Seller is not obligated to procure products, services, or other items from others to enable it to perform.

6.0 FACILITIZATION; EXAMINATION - Buyer shall prepare facilities in the manner described in Seller's current facilities manual or other agreed upon document at least two days prior to Seller's delivery of products to Buyer or the commencement of any services for Buyer. Buyer

shall be responsible for all additional costs to Seller caused by Buyer's failure to prepare such facilities in advance of delivery or commencement of services. Seller's obligation to provide installation services shall expire fourteen (14) months from the shipment date. Seller shall have no obligation to provide such installation services or to refund any monies paid for such services after fourteen (14) months from shipment date. Buyer shall examine all products (not subject to a pre-agreed installation and acceptance procedure performed by Seller) upon receipt and must notify Seller in writing immediately of any complaint or grounds for rejection. Buyer agrees to cooperate with Seller as required to return to Seller fixtures and components included to facilitate product shipment. Seller may, at its option, accept non-defective returned products provided they are unused, undamaged, sealed in the original packaging, accompanied by Seller's return authorization, and received by Seller within sixty (60) days of Seller's delivery; Seller may reject all other returns. Non-defective returned products accepted by Seller will be credited to Buyer's account, subject to a 20% restocking fee. No restocking fee will be assessed where products are returned because of an incorrect shipment due solely to Seller's fault and such products are returned to Seller within the sixty (60) day period in the condition described above. For refurbished products (inclusive of upgrades) where Buyer is providing the core, Buyer must provide access to the cores for auditing by Seller if deemed necessary by Seller. Buyer's acceptance of the quotation, or shipment of the core to Seller's designated factory, will indicate Buyer's authorization to perform the services described in the quotation. Unless otherwise specified in Seller's quotation, Seller will replace parts specific to the refurbished product with OEM-certified parts consistent with current forward build configurations. Obsolete or down-revision parts on the core that are not relevant to the agreed specification for the refurbished product are not replaced unless specifically noted in Seller's quotation. Consumable spare parts needed to return the refurbished product to operational status will be replaced with new parts consistent with the quotation. SELLER HAS THE RIGHT TO RETAIN REMOVED PARTS. Buyer shall decontaminate, decommission, defacilitize and pack the core to Seller's specification and deliver the core to Seller's designated service location. Except for damages caused solely by Seller's negligence or intentional misconduct, Buyer shall retain the risk of loss or damage to the core during shipment and refurbishment at the service location. When the core is to be shipped across national boundaries, Buyer will be exporter of record and will secure all needed export and import licenses. SHIPMENT OF THE CORE TO SELLER'S DESIGNATED FACTORY SHALL BE MADE PER SELLER'S SCHEDULE IN ORDER TO MEET BUYER'S SHIPMENT DATE. Buyer shall secure such insurance as it deems fit to meet its risk profile.

7.0 **LIMITED LICENSE TO BUYER -**

7.1.1 Licensed Technology. Products may contain or utilize Licensed Technology, as defined below. "**Licensed Technology**" means (a) software (other than Third-Party Software, as defined in Section .7.1.10 below), (b) Content (as defined below) and (c) Process Technology (as defined below). "**Content**" means all text, images, video, and other informational materials in any medium, which are made available by Seller to Buyer via products, software or the provision of services. "**Process Technology**" means all process information, best known methods, and other confidential information provided with or included in the products.

7.1.2 Limited License. Buyer is granted a limited, nonexclusive, non-assignable, non-transferrable personal license to use the Licensed Technology provided with or included in the product at the time of delivery, solely for the intended use of manufacturing semiconductors in Semsysco products in Buyer's fab, for a term of one

(1) year from the earlier of the date of shipment of the product containing or utilizing such Licensed Technology or installation of such Licensed Technology provided Buyer has made timely payments for the relevant product, software or service in accordance with the payment terms in Section 2 of this Agreement.

- 7.1.3 License Renewal. This license shall automatically renew for an additional one (1) year at each anniversary provided Buyer has not breached this Agreement (including any provision of this Section 7) and further provided Buyer has not sold, licensed, sublicensed, assigned, leased, transferred, or otherwise disposed of Buyer's interest or rights in the product which is the subject of this Agreement.
- 7.1.4 Limited License for Process Technology. Buyer is granted a limited, nonexclusive, non-assignable, non-transferrable personal license to use Process Technology provided with or included in the product at the time of delivery. The Limited License shall not include Process Technology which was not provided with or included in the product at the time of delivery.
- 7.1.5 Ownership of the Licensed Technology. Seller shall retain sole and exclusive ownership of all rights, title, and interest in and to the Licensed Technology, subject only to Buyer's expressly granted rights herein, and no transfer of title, other ownership interest, right to sublicense or any other rights whatsoever are granted or implied.
- 7.1.6 Use Requirements. This license is strictly limited to use of the Licensed Technology exclusively by Buyer and exclusively on the specific product module or chamber with which it was supplied.
- 7.1.7 No Reverse Engineering. Buyer agrees not to, and not to permit others to, copy, modify, duplicate, decompile, disassemble, translate or reverse-engineer the Licensed Technology (and accompanying manuals), nor the parts, components or assemblies they describe, in any manner or form nor to export the Licensed Technology in any manner prohibited by applicable law.
- 7.1.8 Non-transferability. Buyer agrees not to sell, assign (as a result of a Change of Control (which will be deemed to be an assignment) or by operation of law or otherwise), distribute or otherwise transfer any Licensed Technology. For purposes of this section, "**Change of Control**" means the occurrence of any of the following events: (a) any consolidation or merger of Buyer with or into any other entity in which the holders of Buyer's outstanding voting securities immediately before such consolidation or merger do not, immediately after such consolidation or merger, retain voting securities representing a majority of the voting power of the surviving entity or voting securities representing a majority of the voting power of an entity that wholly owns, directly or indirectly, the surviving entity; (b) the sale, transfer or assignment of securities of Buyer representing a majority of the voting power of all of Buyer's outstanding voting securities to an acquiring party or group; or (c) the sale, lease, exclusive license or other disposition (in a single transaction or series of related transactions) of assets representing more than fifty percent of the net book value or fair market value of the assets of the business unit, division or subsidiary of Buyer that originally acquires and uses the product which is the subject of this Agreement.

- 7.1.9 Back-up. Buyer may make one backup or archival copy only of the Licensed Technology in object code or other machine-readable form.
- 7.1.10 Third-Party Software. “**Third-Party Software**” is software that is licensed by a party other than Seller (i.e., a third-party licensor). The software’s creator or owner and its licensors are third party beneficiaries of this license and are entitled to enforce it. Software provided by Seller may include Third-Party Software which may be in the form of open-source software. Some Third-Party Software is provided to Buyer subject to the terms of the third-party’s end user license agreement, available to Buyer upon Buyer’s request. Buyer will be responsible to do whatever is necessary or required by the third-party licensor for the licenses to Third-Party Software to take effect (e.g., online registration). It is Buyer’s responsibility to adhere to the third-party software licenses. To the extent the licensed software is Third-Party Software or contains components that are Third-Party Software, NOTWITHSTANDING ANYTHING TO THE CONTRARY IN SECTION 8 HEREIN, SELLER PROVIDES SUCH SOFTWARE “AS IS” AND WITHOUT ANY WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, AND BUYER’S USE OF SUCH THIRD-PARTY SOFTWARE SHALL BE GOVERNED BY TERMS OF THE SOFTWARE LICENSE(S) APPLICABLE TO SUCH THIRD-PARTY SOFTWARE. Buyer will have no recourse against Seller with respect to Third-Party Software.
- 7.1.11 Confidentiality of Licensed Technology. Buyer agrees that the Licensed Technology and the parts, components or assemblies they describe, constitute Seller’s Confidential Information and that it will not disclose same except to its employees who have a demonstrable need to know, and who, prior to receipt, have signed an agreement or have recognized legal obligations that will protect Seller’s rights hereunder.
- 7.1.12 Improvements and Derivation to Process Technology. All improvements and derivations developed by Buyer based upon the Process Technology that are not materially different as a whole from the Process Technology shall be used only on equipment manufactured by or for Seller.
- 7.1.13 Audit Rights. Buyer shall permit Seller to audit Buyer’s facilities and systems, at reasonable intervals, for compliance with this license. SELLER MAY EMBED THE NEED FOR A SOFTWARE KEY TO OPERATE ANY LICENSED SOFTWARE TO PROVIDE FOR COMPLIANCE TO THESE LICENSE TERMS; ANY VIOLATION OF THESE TERMS SHALL BE A BASIS FOR IMMEDIATE TERMINATION OF THIS LICENSE.

- 8.0** LIMITED WARRANTY - Seller warrants to Buyer as original purchaser during the Warranty Period (as defined below and as applicable) that: (a) consumable parts shall conform to proper form, fit and initial function on the date of shipment without any warranty of duration in Buyer’s application; (b) new products shall be free from defects in material and workmanship and shall conform to Seller’s published specifications (or other specifications agreed upon in writing by the parties); (c) other products (including non-consumable spares) shall be free from defects in materials and workmanship and (d) Services performed by Seller shall be free

from defects in workmanship and (e) software created by Seller and licensed hereunder shall perform in the manner described in Seller's written documentation, subject to the remedies described in this section. Notwithstanding the foregoing, if Seller's quotation indicates that products, services or software are being provided by Seller "as is" or that this Agreement is a "results based contract", then notwithstanding anything to the contrary herein, Seller expressly acknowledges that the products, services and software provided hereunder are provided on an "as is" basis without warranty of any kind, and **ALL WARRANTIES WHETHER WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND ALL OTHER SELLER OBLIGATIONS OR LIABILITIES IMPLIED BY LAW ARE EXPRESSLY DISCLAIMED.**

- 8.1.1 **Warranty Period.** Any claim for breach of this warranty must be submitted to Seller within the following applicable warranty periods ("**Warranty Period**"): (a) twelve (12) months from the date of Acceptance, but in no event later than fourteen (14) months from date of shipment for new products; (b) ninety (90) days from the date of Acceptance, but in no event later than one hundred and fifty (150) days from date of shipment for refurbished products, NUSED products, or upgrades; (c) ninety (90) days from the date of shipment of software licenses and all other parts or products; (d) one day from Buyer's receipt of consumable parts; and (e) ninety (90) days from the date of performance of Services. This warranty will not apply to subsequent purchasers.
- 8.1.2 **Claim Submission.** This warranty will apply to Buyer only if Buyer: (a) promptly notifies Seller in writing during the period set forth above of the claimed defect or nonconformity, and (b) makes the item(s) available for correction at Buyer's facility or returns the item(s) after obtaining prior written authorization from Seller. Buyer bears the risk of loss or damage during transit and all expenses incurred by Seller for unauthorized shipments. Unless otherwise agreed in writing, Buyer's return of such items constitutes Buyer's authorization for Seller to repair the products and to invoice Buyer for any and all reasonable costs of repair, labor, parts and freight on items not covered by the terms of the applicable warranty. Seller's liability hereunder is limited solely, at Seller's option, to repair or replacement with new, or "like new" equivalent products, and any warranty service is limited to Seller's standard working hours (usually 8 a.m. to 5 p.m., Monday through Friday). Seller shall hold all right, title and interest in and to any products replaced under this warranty provision. The period for making warranty claims shall not be extended by acts of Seller in compliance with this section. Licensed Technology is not warranted as free from errors or "bugs", and Seller's sole obligation is to use reasonable efforts to supply Buyer with a corrected version after notice of defect.
- 8.1.3 **Exclusions.** This warranty is voidable by Seller should (a) Buyer not reasonably comply with the requirements and recommendations of Seller's preventative maintenance program, (b) Seller's examination discloses to its satisfaction that such defect or nonconformity does not exist, (c) Seller's examination discloses to its satisfaction that a defect or nonconformity was caused, in whole or in part, by events or conditions beyond Seller's reasonable control or by any acts or omissions of Buyer, the failure of designs or components required by Buyer, improper

application, or unauthorized maintenance, repair or alteration, or (d) Seller's examination discloses to its satisfaction that the equipment was maintained or serviced by a third-party not authorized by Seller or contains or utilizes parts not supplied or approved by Seller.

- 8.1.4 **DISCLAIMER. THE FOREGOING WARRANTIES ARE EXCLUSIVE OF ALL OTHER WARRANTIES. SUBJECT TO ANY STATUTORY WARRANTIES THAT CANNOT BE EXCLUDED, SELLER MAKES NO WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, REGARDING THE PRODUCT, SERVICE OR LICENSED TECHNOLOGY, IF ANY, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OR CONDITIONS OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, FAVORABLE PRICING, TIMELY DELIVERY, AND ANY WARRANTY OR CONDITION OF NON-INFRINGEMENT. SOME STATES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF EXPRESS OR IMPLIED WARRANTIES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO BUYER. IN THAT EVENT, SUCH WARRANTIES ARE LIMITED IN DURATION TO THE MINIMUM PERIOD REQUIRED BY LAW. NO WARRANTIES APPLY AFTER THAT PERIOD. SOME STATES OR JURISDICTIONS DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE ABOVE LIMITATION MAY NOT APPLY TO BUYER. THE FOREGOING CONSTITUTES BUYER'S SOLE AND EXCLUSIVE REMEDY FOR SELLER FURNISHING DEFECTIVE OR NONCONFORMING PRODUCTS, SYSTEMS, MATERIALS, SPARE PARTS, SERVICE OR LICENSED TECHNOLOGY.**

- 9.0 SELLER'S INDEMNIFICATION OF BUYER FOR INTELLECTUAL PROPERTY INFRINGEMENT** - Seller shall indemnify Buyer from any third-party legal action against Buyer that a product, Seller-provided service, or Licensed Technology infringes any third-party patent, copyright, mask-work or similar intellectual property or trade secret right existing, on the date of delivery, in the U.S., Canada, the European Union, the U.K., Japan, Singapore, Malaysia, The Republic of China (Taiwan), South Korea or the People's Republic of China, and, to the extent limited below, shall hold Buyer harmless from all damages and reasonable costs finally awarded against Buyer in such legal action by a court of competent jurisdiction; provided that Buyer: (a) gives Seller prompt written notice of any such legal action together with all requested information, assistance and authority during the course of the investigation or defense of any such claim; and (b) permits Seller, at its option and through counsel of its choice, to answer and control the defense of such claim and any related settlement negotiations.

- 9.1.1 **Exceptions.** Notwithstanding the foregoing, Seller shall have no liability or obligation to indemnify Buyer where: (a) the infringement is attributable to Buyer-supplied or Buyer-specified designs or processes having been incorporated into the product; (b) such legal action or the damages, costs or losses arising therefrom, would have been avoided but for the combination, operation or use of the product, service, or Licensed Technology with devices, parts, processes or software not supplied or not required by Seller, including modifications made by Buyer to the product; (c) Buyer or any third-party uses an infringing product, service, or Licensed Technology if a non-infringing product, service, or Licensed Technology, or any reasonable work around which meets the original product specification, is made available to Buyer; (d) the infringing product, service, or Licensed Technol-

ogy was not used in conformity with Seller's recommendations or its intended purpose; and/or (e) Buyer seeks indemnification for cross-complaints or counter-claims by third-parties in actions initiated by Buyer.

9.1.2 Should any product, service, or Licensed Technology become, or should Seller reasonably believe that such product, service, or Licensed Technology is likely to become, the subject of any such legal action, Seller may, at Seller's option and expense: (a) procure for Buyer the right to use the product, service, or Licensed Technology in the manner described in Seller's documentation; (b) replace or modify the product, service, or Licensed Technology to make it non-infringing; or (c) if the right to use the product, service, or Licensed Technology cannot be procured or the product, service, or Licensed Technology cannot be replaced or modified at reasonable expense, reimburse Buyer for the total amount paid by Buyer for the product, service, or Licensed Technology, less reasonable value of Buyer's use.

9.1.3 THE FOREGOING IS SELLER'S ENTIRE OBLIGATION AND BUYER'S EXCLUSIVE REMEDY FOR ALL THIRD-PARTY CLAIMS OF INFRINGEMENT.

10.0 INDEMNIFICATION - Buyer agrees to defend, indemnify and hold harmless Seller from and against all incurred costs and damages (including reasonable attorneys' fees incurred) arising out of this transaction, to the extent caused by (a) a breach by Buyer of a material and express obligation hereunder, (b) a breach of any representation or warranty made by Buyer in this Agreement, or (c) the gross negligence or willful misconduct of Buyer.

11.0 LIABILITY LIMITATION - EXCEPT AS PROVIDED IN SECTIONS 6, 7, 8, 9, 12, 13, 18 or 19, AND NOTWITHSTANDING ANYTHING OTHERWISE TO THE CONTRARY, IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, INCIDENTAL OR PUNITIVE DAMAGES, OR FOR ANY AMOUNT GREATER THAN THE ACTUAL PRICE OR FEE ALLOCABLE TO THE PRODUCT, LICENSE OR SERVICES PAID FOR BY BUYER UNDER THIS AGREEMENT.

12.0 SPECIFICATIONS; CANCELLATION; RESCHEDULING AND CHANGES –

12.1.1 Buyer Specifications. Buyer represents and warrants that any specifications and configurations provided by Buyer to Seller hereunder do not infringe on any copyright or trade secret of any other party.

12.1.2 Rescheduling/Reconfiguration/Changes. Upon prior written agreement of the parties and payment of the fees and/or costs, as reasonably determined by Seller, Buyer may (a) reschedule delivery and/or (b) change the mechanical configuration, specifications or description of the products or services ordered. Any delay (or delays) requested by Buyer which result in a new delivery date more than 150 days from the originally scheduled delivery date will be treated as a cancellation, and incur cancellation fees as set forth below. Reconfiguration or change orders submitted after Seller accepts an order are subject to acceptance at Seller's sole discretion and will result in either a price change or be charged with restocking and/or reconfiguration fees of 20% of the sales order amount in addition to any other fees or costs as reasonably determined by Seller.

12.1.3 Buyer Cancellation. In addition to any price increase owed as a result of Buyer's changes or rescheduling, if Buyer cancels all or part of an order under this Agreement at any time prior to the original scheduled shipment date, then Buyer agrees to pay Seller the following amounts: (a) the total unit price for all products and services which Seller has completed in accordance with the canceled order; and (b) for orders or portions of orders cancelled 75 days or less from the original scheduled shipment date: 100% of the total unit price for all products and services that are cancelled; or (c) for orders that are cancelled more than 75 days, but 120 days or less from original scheduled shipment date: 60% of the total unit price for all products and services that are cancelled; or (d) for orders that are cancelled more than 120 days, but 150 days or less from the original scheduled shipment date: 50% of the total unit price for all products and services that are cancelled; or (e) for orders that are cancelled more than 150 days from original scheduled shipment date: 30% of the total unit price for all products and services that are cancelled. All cancellations must be made prior to shipment; cancellations on or after date of scheduled shipment shall be null and void.

13.0 Export Controls

13.1.1 Each party shall comply with all applicable import and export laws and restrictions, including, but not limited to, the United States Export Administration regulations. Without limiting the foregoing, Buyer will not, except as authorized under all applicable export control laws and regulations, export or re-export any Seller technology, or export the direct product of Seller technology, to any person, entity or destination that is restricted, sanctioned or embargoed under any such export control laws and regulations, or to any person whose most recent citizenship or permanent residence is from an embargoed country.

13.1.2 Buyer acknowledges that Seller's ability to perform under this Agreement is dependent on Buyer's representations, warranties and covenants in this Agreement, and Seller shall not be liable or responsible to Buyer, nor be deemed to have defaulted under or breached this Agreement, by reason of any failure or delay in performing any term of this Agreement (including any warranty provision and including any terms relating to the supply of spare or replacement parts or the furnishing of technical assistance), when such failure or delay is caused by, results from, or is related to (a) the non-availability, denial or cancellation of any export or other license necessary or advisable to allow Seller to perform any term of this Agreement, (b) any breach of a representation, warranty or covenant of Buyer in this Section 13, (c) any violation by Buyer of any applicable export laws and restrictions, including the United States Export Administration regulations, or (d) the Buyer, or the country or territory in which Buyer is located, organized or resident becoming the subject of or new or additional economic sanctions, trade embargoes or export controls imposed by any United States or other governmental entity ("**Excused Nonperformance**"). If an Excused Nonperformance continues for more than sixty (60) days, either party shall have the right to terminate this Agreement by written notice to the other, without liability for the Excused Nonperformance or otherwise as a consequence of such termination.

13.1.3 Any breach of a representation, warranty or covenant of Buyer in this Section 13 shall constitute a material breach of this Agreement by Buyer and shall be cause



for immediate termination of this Agreement by Seller without prior notice to Buyer or opportunity to cure and without liability of Seller to Buyer as a consequence of such termination.

- 14.0 NON-DISCLOSURE** - Buyer agrees neither to use Seller's confidential information in any manner which would result in a disclosure nor to disclose any Seller confidential information to any other person (except to its employees with a demonstrable need to know). All Seller confidential information shall be immediately returned to Seller upon request. Seller agrees to treat the terms of Buyer's purchase order as Buyer's confidential information and shall not disclose any Buyer's confidential information to any other person (except to its employees with a demonstrable need to know).
- 15.0 ASSIGNMENTS** - Neither party shall assign or otherwise transfer any of its rights or obligations hereunder without the prior written consent of the other, except that Seller may assign its right to receive payment, assign this agreement to an affiliated, subsidiary or successor company and/or subcontract the provision of services.
- 16.0 NON-WAIVER** - Failure by a party to take affirmative action with respect to any breach of these terms and conditions by the other party shall not be construed as a waiver of that breach or of future breaches.
- 17.0 COMPLIANCE WITH AND GOVERNING LAW; SURVIVAL OF TERMS** – Each party shall comply with the laws applicable to its performance of this Agreement; without limitation, Buyer shall comply with and indemnify Seller against all liabilities arising from any breach by Buyer or its representatives of any corrupt activities, ethical practices, export control or foreign trade laws that may be applicable to this Agreement or the products, licenses or services that it obtains hereunder. This transaction will be governed, construed and enforced in all respects by the laws of the State of California without regard to conflict of laws considerations. The parties consent to Santa Clara County, California, and any California state and/or federal district court located within its boundaries, as being the exclusive venue and jurisdiction of any litigation or other dispute resolution modality; except that Seller may take action in any jurisdiction to prevent disclosure of Seller confidential information, or enforce a judgment or other decision. If all or any part of these terms and conditions is determined to be unenforceable, the remaining provisions will remain enforceable.
- 18.0 DISPUTES**
- 18.1 **BINDING ARBITRATION** - Any dispute or claim arising out of this Agreement, or the products or services provided hereunder, shall at Seller's discretion be decided by binding arbitration. If the parties cannot agree on an arbitrator, the Superior Court of Santa Clara County shall appoint the arbitrator. Filing a judicial action for recording a notice of pending action, order of attachment, receivership, injunction or other provisional remedies, shall not waive these arbitration rights nor is recourse to such provisional relief precluded by the availability of arbitration hereunder. The parties shall split the arbitrator's fees evenly.
- 18.2 **ATTORNEYS FEES** - In any judicial or arbitration proceeding arising out of this Agreement, or the products or services provided hereunder, the prevailing party is entitled to recover all reasonable costs incurred pertaining to such proceeding, in-

cluding without limitation reasonable costs and fees of attorneys or other professionals ("**Expenses**"), except that and such Expenses awarded must bear a reasonable relationship to the prevailing party's actual recovery.

18.3 WAIVER OF JURY/LIMITATION OF ACTIONS - Buyer and Seller hereby agree, to the fullest extent permitted by law, to waive any right to adjudication by jury of any claim or cause asserted against the other and arising hereunder and, further, that any such claim or cause if not brought within two (2) years of the event from which the claim or cause arises, shall be forever waived and time-barred.

19.0 GOVERNMENT CONTRACTS OR SUBCONTRACTS - Buyer represents and warrants that (a) by providing products or services hereunder, Seller will not be acting as a subcontractor under any government contract or subcontract, (b) the products or services being sold or licensed hereunder are not necessary, in whole or in part, to the performance of any government contract or subcontract and (c) by performing, undertaking or assuming the obligations of Seller under these terms and conditions, Seller will not and does not perform, undertake or assume any portion of Buyer's or any other person's obligations under any government contract or subcontract. Buyer will indemnify and hold Seller harmless from any damages, losses, liabilities, costs, expenses (including reasonable attorneys' fees) and penalties arising out of, directly or indirectly resulting from or incurred by Seller in connection with any breach by Buyer of any of the foregoing representations and warranties. Without limiting the foregoing, for United States sales, FAR/DFAR will not apply.